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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA,
Petitioners,

v.

TONY LEE NIX, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Assistant Deputy Attorney General

DOUGLAS T. SQUIRE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990

**Counsel of Record*

QUESTION PRESENTED

WHETHER A STATE PRISONER'S CONVICTION IS FINAL FOR PURPOSES OF 28 U.S.C. § 2244(d)(1)(A) ONLY AFTER THE TIME TO PETITION THIS COURT FOR CERTIORARI EXPIRES EVEN WHEN THE STATE PRISONER PURSUED NO FEDERAL CLAIMS ON DIRECT APPEAL?

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA, *Petitioners*,

v.

TONY LEE NIX, *Respondent.*

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at 393 F.3d 1235.

JURISDICTION

Petitioner is seeking review of a decision of the Eleventh Circuit Court of Appeals, *Nix v. Secretary for Dept. of Corrections,* 393 F.3d 1235 (11th Cir. 2004), which interpreted the AEDPA's statute of limitations "conclusion of direct review" provision to include the right to petition this Court for a writ of certiorari despite the absence of a federal question. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED IN THIS CASE

28 U.S.C. 2244(D)(1) provides in relevant part:

> A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

STATEMENT OF THE CASE

The procedural history of the instant case, as set forth by the Eleventh Circuit Court of Appeals, is as follows:

> The state appellate court affirmed Nix's conviction and sentence on December 29, 1998, and the mandate was issued on January 15, 1999. Nix filed an unsuccessful motion for post-conviction relief on December 18, 1999. This motion was finally disposed of on February 28, 2003, when the Florida Supreme Court dismissed his petition for discretionary review. Nix filed a petition for writ of habeas corpus with the state appellate court on December 15, 2000, which was denied on January 11, 2001. He filed a motion to correct illegal sentence on June 8, 2003, which was denied on June 13, 2003. The state appellate court affirmed this denial on July 22, 2003. Nix filed the present petition for writ of habeas corpus on July 15, 2003, during the pendency of his appeal of the denial of his motion to correct illegal sentence.
>
> The district court found that Nix's conviction became final on March 29, 1999, 90 days after the state appeals court affirmed his judgment, i.e., the last day upon which Nix could file a certiorari petition with the U.S. Supreme Court. The district court found that 264 days ran before Nix filed his motion for post-conviction relief. Following the disposition of that motion, the court found that an additional 100 days ran before he filed his motion to correct illegal sentence, which the court found was denied on June 16, 2003. The district

> court found that Nix had one day left in which to file his § 2254 petition, which gave him until June 17, 2003. The court did not accept Nix's argument that he was entitled to equitable tolling, but did state that it was not counting the period from December 15, 1998, to January 25 or 26, 1999, against him. Since Nix did not file his petition until July 15, 2003, the court dismissed his petition as untimely.

Nix v. Secretary for Dept. of Corrections, 393 F.3d 1235, 1235-36 (11th Cir. 2004).

In calculating the period for direct review of Nix's conviction, the district court allowed Nix the time for filing a petition for certiorari with this Court despite the absence of a federal question; but, at the same time, failed to toll the statute of limitations during the pendency of Nix's appeal of the denial of his motion to correct illegal sentence.[1] With credit for both time periods, Nix's petition was 364 days into the one year statute of limitations under 28 U.S.C. § 2244(d), as opposed to 72 days beyond the one year statute of limitations if the date of finality of judgment had been calculated without including the 90-day period from the opinion.

By order entered June 22, 2004, the Eleventh Circuit granted Nix a certificate of appealability. The parties were ordered to brief the following issues:

> (1) whether the district court correctly concluded that appellant's convictions became final, for limitations purposes, 28 U.S.C. § 2244(d)(1)(A),

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[1] In its order, the district court specifically noted the State's argument that Nix was not entitled to the ninety-day period to seek a petition for certiorari because Nix's direct appeal did not include a federal claim; and, included a footnote explaining that it had assumed, for purposes of its opinion, the latest possible deadlines, but stated that those assumptions should not serve as precedent for future cases.

only after the expiration of the ninety-day period during which appellant could have sought certiorari review in the United States Supreme Court, even though appellees argued that the ninety-day window did not apply because appellant raised no federal issue on direct appeal, see *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir.2002), and (2) if the district court correctly applied the *Bond* rule, did the district court err in concluding that the limitations period expired before appellant filed the instant petition, 28 U.S.C. § 2254.

In an opinion dated December 17, 2004, the Eleventh Circuit reversed the district court. In rejecting Petitioner's jurisdictional argument, the court concluded that "simply because a state prisoner has not yet raised a federal claim by the time the certiorari period begins does not make it impossible for the Supreme Court to have jurisdiction over that prisoner's case at some subsequent point before the ninety-day period has ended."

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE ACCEPTED TO RESOLVE THE CIRCUIT CONFLICT CREATED BY *NIX* AND TO SETTLE THE SIGNIFICANT QUESTION WHETHER A STATE PRISONER'S CONVICTION IS FINAL FOR PURPOSES OF 28 U.S.C. § 2244(d)(1)(A) ONLY AFTER THE TIME TO PETITION THIS COURT FOR CERTIORARI EXPIRES EVEN WHEN THE STATE PRISONER PURSUED NO FEDERAL CLAIMS ON DIRECT APPEAL.

This case squarely involves the significant question, that has created a conflict among the lower federal courts, whether a state prisoner's conviction is final for purposes of 28 U.S.C. § 2244(d)(1)(a) only after the time to petition this Court for certiorari expires even when the state prisoner pursued no federal claims on direct appeal. The Court recently addressed a similar question involving federal prisoners in *Clay v. United States*, 537 U.S. 522, 122 S.Ct. 1072 (2003); however, as *Clay* involved direct appeals by federal prisoners, those direct appeals would have included at least one federal issue. This case provides the vehicle within which to bring uniformity to the federal courts and to decide an issue that can potentially arise in every case in which a state prisoner appeals but does not raise a federal issue on direct review.

In the present case, the Eleventh Circuit held that §2244(d)(1)(A) does not require that state prisoners assert a federal claim on direct review in order to avail themselves of the ninety-day certiorari period. In reaching its decision, the Eleventh Circuit reasoned that "the one-year limitation of §2244(d)(1)(A) is concerned solely with the question of time, not with whether a defendant's appeal qualifies on the merits for review by the Supreme Court." However, this expansive reading of the AEDPA's time period for direct review to include certiorari review of appeals by state prisoners who have raised no federal claims is inconsistent

with Congress's intent to "curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation." H.R. Rep. No. 104-23 (1995). Further, the decision of the Eleventh Circuit ignores this Court's decisions explaining that the process of direct review includes the right to petition this Court for a writ of certiorari only if a federal question is involved. *See e.g., Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92 (1983).

In *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999), the Ninth Circuit held that the period of direct review under §2244(d)(1)(A) included the period within which a defendant can file a petition for a writ of certiorari with this Court "[w]hen a challenge to a state court conviction presents a federal question...." In reaching its decision, the Ninth Circuit relied on *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92 (1983). In *Barefoot v. Estelle*, the Court explained that "[w]hen the process of direct review - which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari - comes to an end, a presumption of finality and legality attaches to the conviction and sentence." The Ninth Circuit's ruling was correct. A federal question is required because under section 1257 of title 28 of the United States Code, this Court only has appellate jurisdiction over state court decisions on federal questions. 28 U.S.C. § 1257. *See also*, U.S. Const. art. III, § 2.

Both the Eleventh Circuit and the Ninth Circuit determined that their conclusions were consistent with the decision in *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S.Ct. 708 (1987), addressing the application of newly declared constitutional rules to criminal cases not yet final on direct review. However, as any opinion by this Court creating a new constitutional rule of law would involve the resolution of a claim based on the federal constitution, only the direct appeals of state prisoners who had raised the same federal claim on direct review could be affected by the retroactive application of that new rule of law. Moreover, nothing in *Griffith* contradicts Petitioner's argument that only state

prisoners who raise federal claims in their direct appeals may petition this Court for certiorari review. Thus, the Ninth Circuit was correct, and the Eleventh Circuit was mistaken, in finding their conclusions were consistent with the Court's decision in *Griffith*.

Under 28 U.S.C. § 1257 and its predecessors, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision....'" *Howell v. Mississippi*, __ U.S. __, __, 125 S.Ct. 856, 859 (2005)(quoting *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028 (1997)). *See also, S.Ct. R. 14(1)(g)(I).* Without the improper application of *Griffith*, the Eleventh Circuit opinion is devoid of authority for this Court to "review" a federal question that has not been previously presented or decided. Thus, the Eleventh Circuit's has extended the AEDPA's statute of limitations for potentially thousands of state prisoners with no previously raised federal claims based on the extremely remote possibility that "new law" will arise after a state prisoner's conviction becomes final with only its desire for a "straightforward and reasonable interpretation of §2244(d)(1)(A)" as justification.

Under the Eleventh Circuit's holding, the convictions of all state prisoners are not considered final until the expiration of the ninety-day period for certiorari review to this Court, including state prisoners who failed to raise a federal question required for this Court to have jurisdiction to entertain the petition. However, this holding is contrary to the decision of another circuit court, this Court's decisions, section 1257 of title 28 of the United States Code, Article III § 2 of the United States Constitution, and the intent of Congress to address the problem of delay in the habeas process. Resolution of the important and recurring issue presented here will produce a decision applicable in many cases, and perhaps dispositive on the significant matter of a state prisoner's access to federal habeas corpus review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant review of this case.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Asst. Deputy Attorney General

DOUGLAS T. SQUIRE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone: (386)238-4990

Case No. _____

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UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT.

No. 04-11163
Non-Argument Calendar.

TONY LEE NIX,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(December 17, 2004)

Before TJOFLAT, DUBINA and BARKETT, Circuit Judges:

PER CURIAM:

Tony Lee Nix, a Florida prisoner proceeding pro se, appeals the dismissal of his § 2254 petition for a writ of habeas corpus as time-barred under § 2244(d)(1)(A).

The state appellate court affirmed Nix's conviction and sentence on December 29, 1998, and the mandate was issued on January 15, 1999. Nix filed an unsuccessful motion for post-conviction relief on December 18, 1999. This motion was finally disposed of on February 28, 2003, when the Florida Supreme Court dismissed his petition for discretionary review. Nix filed a petition for writ of habeas corpus with the state appellate court on December 15, 2000, which was denied on January 11, 2001. He filed a motion to correct

illegal sentence on June 8, 2003, which was denied on June 13, 2003. The state appellate court affirmed this denial on July 22, 2003. Nix filed the present petition for writ of habeas corpus on July 15, 2003, during the pendency of his appeal of the denial of his motion to correct illegal sentence.

The district court found that Nix's conviction became final on March 29, 1999, 90 days after the state appeals court affirmed his judgment, i.e., the last day upon which Nix could file a certiorari petition with the U.S. Supreme Court. The district court found that 264 days ran before Nix filed his motion for post-conviction relief. Following the disposition of that motion, the court found that an additional 100 days ran before he filed his motion to correct illegal sentence, which the court found was denied on June 16, 2003. The district court found that Nix had one day left in which to file his § 2254 petition, which gave him until June 17, 2003. The court did not accept Nix's argument that he was entitled to equitable tolling, but did state that it was not counting the period from December 15, 1998, to January 25 or 26, 1999, against him. Since Nix did not file his petition until July 15, 2003, the court dismissed his petition as untimely.

We granted Nix a certificate of appealability on the following issues: (1) whether the district court correctly concluded that appellant's convictions became final, for limitations purposes, 28 U.S.C. § 2244(d)(1)(A), only after the expiration of the ninety-day period during which appellant could have sought certiorari review in the United States Supreme Court, even though appellees argued that the ninety-day window did not apply because appellant raised no federal issue on direct appeal, see Bond v. Moore, 309 F.3d 770, 774 (11th Cir.2002), and (2) if the district court correctly applied the Bond rule, did the district court err in concluding that the limitations period expired before appellant filed the instant petition, 28 U.S.C. § 2254.

This Court reviews de novo a district court's determination that a petition for federal habeas corpus relief is time-barred. Bond, 309

F.3d at 772. Section 2244(d)(1)(A) provides that the one-year limitations period in which a state prisoner has to file a writ for habeas corpus begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Supreme Court Rule 13.1 provides that a petition for a writ of certiorari is timely when filed within ninety days after entry of judgment or denial of discretionary review by the state court of last resort.

The Supreme Court may review a final judgment rendered by the highest court of a state by writ of certiorari when a federal issue is involved. 28 U.S.C. § 1257. Section 2244(d)(1)(A), however, which is the statutory provision at issue here, does not require that defendants assert a federal claim on direct review in order to avail themselves of the one-year limitations period. Rather, § 2244(d)(1)(A) permits a defendant to petition for habeas corpus relief for a period of up to one year beginning from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" (emphasis added). Because the time for seeking direct review of a criminal conviction does not expire until after the ninety-day period for filing for certiorari with the Supreme Court has ended, the most straightforward and reasonable interpretation of § 2244(d)(1)(A) is that the ninety-day certiorari period does not count towards the one-year limitations period. See Bond, 309 F.3d at 774 ("Even the two circuits that have decided § 2255 does not authorize ninety extra days to file for certiorari acknowledged such time is expressly made available under § 2244(d)(1)(A)."). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Griffith v. Kentucky, 479 U.S. 314, 321, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). In other words, the one-year limitation

of § 2244(d)(1)(A) is concerned solely with the question of time, not with whether a defendant's appeal qualifies on the merits for review by the Supreme Court.

This distinction matters not simply as a textual matter, but also because of the possibility that new law will arise after a defendant's conviction has become final at the state level but before the ninety-day period for seeking certiorari with the Supreme Court has expired. If, at some point during the ninety-day period for seeking certiorari with the Supreme Court, the Court hands down a decision that is retroactively applicable to cases on direct review, a defendant whose case is affected by that decision may then suddenly have a basis on which to seek review before the Supreme Court. Thus, simply because a state prisoner has not yet raised a federal claim by the time the certiorari period begins does not make it impossible for the Supreme Court to have jurisdiction over that prisoner's case at some subsequent point before the ninety-day period has ended. Thus, the district court correctly applied the Bond rule and gave the defendant the full one-year period to which he was entitled under § 2244(d)(1)(A).

Nix also argues that the district court erred in its conclusion of when the one-year limitations period began. He maintains that his post-conviction reviews were not final until the time in which he could have filed a motion for rehearing of the denial of his motion to correct illegal sentence had expired, which gives him an additional eleven days of tolled time during his post-conviction review. On appeal, the state does not dispute this point. The one-year limitations period of § 2244(d)(1)(A) is tolled while an "application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2); Coates v. Byrd, 211 F.3d 1225, 1226 (11th Cir.2000). Because a motion for state court rehearing falls within the category of "State post-conviction or other collateral review," it was error for the district court to have failed to toll the statute of limitations during the time Nix appealed the denial of his motion to correct sentence. Although the district court correctly applied the Bond rule in not counting the 90-day certiorari

period towards the one-year habeas limitations period, the district court did err in failing to toll the statute of limitations during Nix's appeal of the denial of his motion to correct sentence. Thus, Nix's habeas petition should not have been dismissed as untimely.

REVERSED and REMANDED for reinstatement of the petition.